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IN THE

Supreme Court of the United States

October Term, 1973.

No. 72-1628.

TELEPROMPTER CORPORATION AND CONLEY ELECTRONICS CORPORATION,

Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC., CALVADA PRODUCTIONS, a Joint Venture, JACK CHERTOK TELEVISION, INC., and DENA PICTURES, INCORPORATED,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

MOTION FOR LEAVE TO FILE AND BRIEF FOR NATIONAL BROADCASTING COMPANY, INC., *AMICUS CURIAE.*

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MOTION FOR LEAVE TO FILE BRIEF FOR NATIONAL BROADCASTING COMPANY, INC., *AMICUS CURIAE.*

Pursuant to Rules 35 and 42 of the Rules of this Court, National Broadcasting Company, Inc. (NBC) respectfully moves the Court for leave to file the attached brief *amicus curiae* and in support thereof represents:

1. NBC is a Delaware corporation engaged in the operation of a television network which makes television programming available to approximately 200 affiliated television stations throughout the country. NBC also owns and operates five commercial television stations in the United

States. Pursuant to license from copyright proprietors, NBC is a major user of copyrighted works created by others. NBC is also the copyright owner of a small number of original television entertainment and news programs produced for network broadcast.

2. NBC's principal concern in this action is that reversal of the Second Circuit's holding in respect of CATV's copyright obligations for distant signal importation would subvert the entire philosophy of the copyright laws. These laws stimulate and encourage the creation of artistic property by giving creative talent—artists, writers, musicians, directors, composers—the right to reap the financial rewards from the commercial exploitation of their creations. By maximizing the available rewards, the copyright laws seek to encourage and stimulate the creative process. Interpretation of those laws in such a manner as to defeat this essential policy will decrease the supply of creative property and impede the development of television programming attractive to the public.

In the case at bar, various cable systems have taken television programs broadcast under exclusive licenses granted by copyright owners and have retransmitted those programs to markets where they have not been expressly licensed to be shown. The copyright owners receive nothing for this additional use of their programs; the CATV operators retain all the revenues received from their commercial exploitation of the programs. No artistic property is created or stimulated by the CATV practices. On the other hand, broadcast licensees which do pay for the rights to carry copyrighted programs are put in a disadvantageous competitive position. These results are inconsistent with the copyright laws.

3. NBC has requested the parties herein to give their consent to its filing of a brief as *amicus curiae*. On Decem-

ber 3, 1973, counsel for respondents gave their consent. On December 10, 1973, counsel for petitioners declined to give their consent, but indicated that they did not intend to oppose this Motion. In the belief that this Court should have the benefit of all points of view in a case of such far-reaching consequence, NBC urges it to accept the brief *amicus curiae*.

WHEREFORE, NBC requests this Court to grant it leave to file the brief *amicus curiae* annexed hereto.

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December 19, 1973.

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BRIEF FOR NATIONAL BROADCASTING COMPANY, INC., *AMICUS CURIAE.*

I. INTEREST OF *AMICUS CURIAE.*

As indicated in the motion accompanying this brief, National Broadcasting Company, Inc. (NBC) is a Delaware corporation engaged in the business of operating a television network. In this capacity, NBC is a major user of the artistic output of the creative community. NBC believes that the rule now urged upon this Court by the CATV industry would be harmful to the creative community, would

reduce that community's incentive to produce high quality television programming, would impair its ability to attract the talent necessary to maintain high quality standards, and would thereby reduce the quality and quantity of the programming that NBC is able to present to the public.

In addition, NBC owns and operates five commercial television stations in the United States and has an interest in the outcome of this case in its capacity as a station owner. The exemption from copyright liability sought here would give CATV stations an unfair advantage in their competition with local broadcasting stations for a share of the audience. Although CATV stations and local stations (including NBC's affiliated stations and NBC's owned stations) would be competing for the same general audience, the local broadcasting stations would be required to pay for the right to broadcast their programs, but the competing CATV stations would not.

Finally, NBC is the copyright owner of a small number of original entertainment and news programs produced for broadcast on the NBC Television Network. As such, it has a direct interest in any proceeding that seeks to relieve a major segment of the broadcast industry from its obligation to pay copyright owners for the right to use their programs.

II. SUMMARY OF ARGUMENT.

The fundamental purpose of copyright protection is to confer upon the public the benefits of creative genius. The copyright laws achieve this goal by giving creators of artistic works the exclusive right to exploit their creations commercially, and thereby to motivate them to further efforts. To permit the CATV industry free carriage of distant signals would be to subvert this entire scheme and to deprive the public of part of the benefits to which it is entitled. Moreover, a policy of free distant signal transmission would be inimical to the interests of all engaged in the business of transmitting television programming to the public. All broadcasters rely upon the creative community to produce the programs transmitted to the public. Any rule that deprives the creative community of the very rewards that the copyright laws were enacted to preserve would reduce the quality and quantity of available television programming. This reduction would redound to the detriment of all engaged in presenting programs to the public, including the cable industry itself.

III. ARGUMENT.

Permitting Cable Systems to Intercept and Retransmit Television Signals to Distant Markets Without Payment of a License Fee Subverts the Fundamental Objective of Copyright Protection and Threatens to Reduce the Available Supply of Creative Product.

Creative talent is a relatively rare human trait. It has long been recognized that the essential goal of copyright protection is to confer upon the public the benefits to be derived from the product of that talent. See 1 M. Nimmer, **Copyright** § 3.1 (1973). This Court has consistently emphasized this fundamental objective. In **Fox Film Corp. v. Doyal**, 286 U. S. 123, 127-28 (1932), for example, the Court said:

> "The sole interest of the United States and the primary object in conferring the [copyright] monopoly lie in the **general benefits derived by the public** from the labors of authors. A copyright, like a patent, is 'at once the equivalent given **by the public for benefits bestowed** by the genius and meditations and skill of individuals and the incentive to further efforts for the same important objects.' *Kendall v. Winsor*, 21 How. 322, 327, 328; *Grant v. Raymond*, 6 Pet. 218, 241, 242." [1]

See also **Mazer v. Stein**, 347 U. S. 201, 219 (1954); **Washingtonian Publishing Co. v. Pearson**, 306 U. S. 30, 36 (1939).

The overall scheme of the Copyright Act (17 U. S. C. § 1, *et seq.*)—the way in which provision has been made for the achievement of the goal of maximum public benefit—involves the grant of certain "exclusive rights" (17 U. S. C. § 1) to the creators of artistic works so that they may exploit their creations for profit and thereby be moti-

1. Whenever boldface is used in this brief, the emphasis is ours.

vated to further creativity. The Copyright Clause of the Constitution (Art. I, sec. 8, cl. 8) itself speaks in terms of exclusivity. It provides that Congress shall have power:

> "To promote the progress of science and useful arts, by securing for limited times to authors and inventors the **exclusive right** to their respective writings and discoveries."

Pursuant to this constitutional mandate, the Copyright Act confers on the copyright proprietor a monopoly—the exclusive right to his own creation—in order to enable him to reap financial rewards from his work and to encourage him to further effort. It is this policy of stimulating creativity by providing monetary incentives to those with creative talent that would be subverted by permitting the CATV industry free carriage of signals to distant markets.

The copyright laws are intended to provide financial rewards to those who create. Owners of copyrights can limit the uses to which their products will be put and can exploit their products on a market-by-market basis. They are entitled to limit the number of licensees of their product and to attempt to maximize the revenues they can obtain. It is elementary that permission given to one user does not constitute permission to another, and that performance of the work in public does not constitute a forfeiture of the owner's rights in his creation. See **Ferris v. Frohman**, 223 U. S. 424 (1912); **Walt Disney Productions v. Alaska Television Network, Inc.**, 310 F. Supp. 1073 (W. D. Wash. 1969).

Where television is concerned, the public audience is so large that the need for a constant supply of high quality artistic property is especially important. Unlike, perhaps, any other user of artistic property, television has a constant need to fill virtually 24 hours a day with programming that

will have substantial mass appeal. Television's ultimate success in achieving that goal depends to a very large extent on there being a sufficient number of talented people involved in the creative process. This, in turn, depends directly on the financial rewards that are available.

In transmitting distant signals to local markets, cable systems make use of artistic property without contributing any corresponding benefit to the creative community. In the first place, the cable systems use the programs without paying for them; this reduces the available funds to creative talent and expressly abridges their property rights. CATV takes works in which program creators have a constitutionally-mandated and congressionally-protected monopoly and converts those works to its own use, contrary to the fundamental copyright philosophy that those who make use of the artistic output of others should pay for that use. Second, unlike television broadcasters, cable systems charge their audiences subscription fees to view these programs.[2] No portion of these fees is used to reward copyright owners of the programs that generate this income. No portion is used to stimulate the creation of new programs. By taking what is already in existence and simply transferring it to a new market, CATV keeps the total quantity of available creative property at the existing level.

The cable industry should not be exempt from the obligation which the law imposes on commercial users of television programs, to pay the copyright owners of the

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2. As of January 1, 1973, there were approximately 7,300,000 cable subscribers in the United States (1973-74 **Television Factbook**, p. 84A). Assuming that each subscriber paid $60.00 per year, the revenues that the cable industry enjoyed exceeded $438 million.

The revenues that cable now enjoys may well increase substantially in the future. Many believe that cable, because of its expanded channel capacity, could become the predominant form of telecommunication. See **United States v. Midwest Video Corp.**, 406 U. S. 649, 651 (1972).

programs for that use. CATV's interception of local signals and rebroadcast of them in distant markets does not fall into any recognized exemption from copyright liability, such as the "fair use" doctrine. See, *e.g.*, **Rosemont Enterprises, Inc. v. Random House, Inc.**, 366 F. 2d 303, 306-08 (2d Cir. 1966), *cert. denied*, 385 U. S. 1009 (1967). And this Court should not create a special exemption for CATV. If any fundamental changes in national copyright policy were justified at all in this area, they should be made by Congress, not the courts. Indeed, proposed new copyright legislation is at this very moment pending in Congress. This Court should not rush into a reconstruction of the Copyright Act to accommodate practices the economic effects of which are wholly unknown, and which are, in any event, of very questionable propriety.

But, beyond this, whether the question is one for this Court or Congress to resolve, the fact of the matter is that there is no cogent reason why CATV should be treated differently from any other user of a creative property. To the contrary, it is imperative that the cable industry be obliged to pay for the use it makes of copyrighted television programming.

A television program is the product of the creative genius of people in a variety of callings—artists, writers, musicians, directors and composers. In this respect, it differs from a literary work, for example, where the talent of the author is generally the only creative feature of the protected work. As a result of the complexity of the talent required to produce a television program, the financial demands and the consequent economic risks upon the program producer are greater than for the literary work. The capital investment is much higher for a television program than for a novel, and the number of people to be rewarded from the profits of the venture is likewise greater. The

ultimate quality of the programming viewed by the public on home television screens depends on the ability of the producer to attract this variety of talent necessary to produce a program. This ability and the quality of the talent attracted are directly related to the financial rewards available.

Any reduction in revenues to producers of television programs harms not only the producers and the creative talent they employ; it harms everyone who carries television programs—networks, local broadcasting stations and, in the long run, the CATV industry itself. Each of these groups is in the business of presenting programs to the public. Each relies upon the creative community to produce the programs necessary for this purpose. Any reduction in the quality or quantity of creative product resulting from a diminution in the financial incentive for program creators will necessarily have an adverse impact on all those who utilize their product, including CATV.

Since the rule to emerge from this case will be with us for a long time to come, this Court must consider not only the immediate impact of the rule urged upon it by the cable industry, but also the effect of that rule upon the continuing development of entertainment programming in this country. If the CATV industry were exempt from copyright liability and if it continues to grow as expected, the revenue drain on the creative community will mount, the availability of creative product will diminish and all those providing the viewing public with the output of the creative community—CATV operators as well as regular broadcasters—will suffer, as will the public itself. In terms of long-range policy, it makes no sense at all—from anyone's standpoint—to tamper with the fundamental copyright scheme as it pertains to CATV's interception and retransmission of television signals to distant markets.

Like any other commercial user of television programs, the cable industry has an obligation under the copyright laws to compensate the program owners for the use of their product. CATV should live up to its obligation by paying its fair share of the constitutionally-mandated cost of giving creative genius "the incentive to further efforts" that this Court in **Fox Film Corp v. Doyal**, *supra*, recognized to be at the heart of copyright policy.

III. CONCLUSION.

The CATV industry argues that because a program is broadcast over the air waves for regular television antenna reception, the artistic and commercial value of the copyrighted work is somehow brought into the public domain by reason of the initial broadcast. This is like saying that the public performance of a play constitutes an abandonment of it to public use, a proposition which this Court long ago rejected in **Ferris v. Frohman**, 223 U. S. 424, 435-36 (1912).

There is no doubt that if a CATV operator intercepts a television signal, reproduces it electronically, and stores it for later retransmission to the same or a different audience, such conduct would be a clear infringement of the copyright. See **Walt Disney Productions v. Alaska Television Network, Inc.**, 310 F. Supp. 1073 (W. D. Wash. 1969). That situation is no different from the factual posture of the case at bar. A CATV operator who intercepts a television signal broadcast by a legitimate copyright licensee and commercially exploits the program in a market to which the signal was not directed should compensate the owner of the program for this new use of his work. That is the primary consideration. All other considerations, including the rather technical and mechanistic arguments advanced by petitioners, are secondary at best.

We urge the Court to affirm the decision of the United States Court of Appeals for the Second Circuit, and to hold that the importation of distant signals by CATV operators is an infringement of the copyright.

Respectfully submitted,

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